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In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1957

No. 611

GEORGE H. TAYLOR, MAUDE T. MONTGOMERY, MARIE A. LEITCH and JULIA M. TAYLOR
Petitioners

v.

THE COMMONWEALTH OF KENTUCKY

ON APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

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PETITIONERS George H. Taylor, Maude T. Montgomery, Marie A. Leitch and Julia M. Taylor, appellants in *Taylor and others* v. *Kentucky*, No. 611, October term,

1957, pray that this Court will grant a rehearing upon its order of January 20, 1958, dismissing their appeal for want of a substantial federal question. This for the following reasons:

IT IS NOT DISPUTED, indeed the Court below so held[1] that section 4076h[2] of the Kentucky Forfeiture Act of 1906 gave petitioner George Taylor and claimants of his class the right under that section to a sale of the lands not already vested in the "occupants" by section 4076g[3].

Had he appeared seasonably in the case at bar he could have exercised that right; indeed, it was the primary object of the motion he filed in it in 1955[4].

What prevented his seasonable appearance?

The answer is equally undisputed. He was deprived of notice of this action by fraud[5], perpetrated by or through the Commonwealth's Attorney, the officer whose statutory duty it was to swear to the originating petition in the trial court and to conduct proceedings therein[6].

Thus judgment rendered in the court below in favor of Kentucky was founded on the fraud for which its own officer was responsible.

The answer below was that Taylor could or should have known of the existence of the case at bar when it was

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[1] Jurisdictional Statement, Ap. B, p. 11-12
[2] Jurisdictional Statement, Ap. G, p. 28
[3] Jurisdictional Statement, Ap. C, p. 28.
[4] Record, pp. 26-27.
[5] Jurisdictional Statement, pp. 7-8.
[6] Jurisdictional Statement, Ap. C, p. 22

brought. But this is to disregard the realities of the case, in fact to make sport of Taylor.

The patent lies in four counties:[7] Floyd, Pike, Knott and Letcher and this case could have been brought in any one of them[8].

Thus, according to the opinion below, in order to avoid proceedings against himself *without process*, Taylor (a resident of Virginia) would have had to maintain counsel or other representatives to watch proceedings and posting at all four county seats[9].

Taylor knew of course of the old Pike County suit instituted in 1907. He may even, though he was resident in a different Federal circuit, have known of *Pen-Ken v. Warfield*, mentioned in the opinion below—Jurisdictional Statement, Appendix A, pages 4 & 5. No doubt, also, as the court suggested, other factors were present leading him to expect litigation over the patent in Floyd County or two or three counties besides. Actually all he could do about it, however, in order to meet the extraordinary standards of care set up by the opinion was to keep a permanent eye on the dockets of the several courts in which the patent lies. This of course amounts to subjecting him to precisely that degree of total responsibility against which it has been hitherto supposed that it is the constitutional function of procedural due process to protect him.

In short, as has been pointed out, the person least protected by the requirements of process, and most vulnerable

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[7] Jurisdictional Statement, Ap. A, p. 3 (opinion below).

[8] Section 4076d, Jurisdictional Statement, Ap. C, p. 22.

[9] Or at any rate three of them, if the earlier *Pike County suit* (Record, p. 5) forfeited *all* the patent in that county (Please see opinion below, Jurisdictional Statement, Ap. A, p. 3).

to fraud in this aspect, was the person—Taylor—with the greatest interest in the property.

This is a necessary corollary of the holding of the Kentucky court and a clear indication that it was determined that Taylor must not recover in any event.

Moreover, petitioners have been twice refused oral argument before the court below[10]. It is admitted that this is in accordance with the court's practice[11] but reference may be made to statements of the late Mr. Chief Justice Hughes and Mr. Justice Frankfurter (before his elevation to the Bench) to the effect that oral argument is desirable or necessary for full consideration.

AS AGAINST THE BACKGROUND THUS OUTLINED, the Court is respectfully requested to consider the following quoted holding in *Covey* v. *Somers*[12], *a case in which appeal was permitted:*

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might

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[10] Record, pp. 69, 70, 79.

[11] Rules of Court of Appeals of Kentucky, Rule 1.280: "Oral arguments will be heard on motion of either party or on the Court's own motion in such cases as the Court may believe an oral argument will materially contribute to a proper decision."

[12] 351 US 141, 146.

reasonably adopt to accomplish it". *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306, 314, 315, 94L ed 865, 873, 874, 70 S Ct 652.

> Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

With this should be compared *Nelson* v. *New York*[13] in which written notice of tax foreclosure of real estate (kept from the owner's knowledge by his employee's dishonesty) was ultimately held constitutionally sufficient. *This Court nevertheless found the federal question substantial.*[14]

While the reasons leading the Court to consider a federal question insubstantial are rarely available, so that it is difficult to find general principles by which petitioners might have been guided, it seems equally difficult to distinguish in this respect between the case at bar and the cases just cited, especially the earlier one. Indeed, the case at bar would seem, if anything, stronger. Service here, as is undisputed, was based on deliberate fraud instead of what may, after all,

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[13] 352 US 103.
[14] 351 US 930.

with the authorities of the town of Somers, have been a misconception of their duty. And while in *Covey*, the method of service was a "mere gesture", in the case at bar, it was *active* deception: fraud not only on Taylor but on the court.

It is not easy to conceive of conduct more strongly demanding judicial intervention—not only as clarifying the changing concept of procedural due process but as punishment for flagitious conduct.

FOR THE REASONS SET FORTH it is submitted that the federal question is substantial and petitioners' appeal should be heard.

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I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ALEXANDER H. SANDS